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No. 93-1935

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Union Fire Insurance Company of Pittsburgh, PA ("National Union") respectfully moves this Court, pursuant to Rule 36.3, for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of attorney for the petitioner has been obtained. The consent of attorney for the respondents has not been obtained.

National Union is one of the largest underwriters in the United States of insurance covering certain liabilities arising from claims under the Employee Retirement Income Security Act of 1974 ("ERISA"). National Union has issued a policy which covers certain ERISA-related liabilities of petitioner Curtiss-Wright Corporation. In addition, National Union has issued similar policies to

well over a thousand other employee benefit plan sponsors who may be exposed to liability if the decision below is not reversed. National Union therefore has a substantial interest in the outcome of this case. Moreover, the uncertainty engendered by the decision below as to the validity of current terms of employee benefit plans makes it more difficult for National Union to underwrite policies of insurance that cover ERISA-related liabilities. Unless the decision below is reversed, this difficulty will either increase the cost or restrict the availability of such insurance, thus harming the companies that sponsor employee benefit plans and making it less likely that they will continue to provide such plans.

National Union therefore requests this Court to accept the attached brief in support of the petition for certiorari in this case.

Respectfully submitted,

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July 1, 1994

QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

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BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

On its surface, the decision below addresses only a narrow, apparently obscure issue of statutory interpretation. What a surface look does not reveal, however, is the sweeping impact of that decision in invalidating the terms of corporate-sponsored employee benefit plans and the wave of significant litigation that will be ushered in by the decision. Because the decision creates a conflict

among the circuits and advances a rationale that exposes corporations that sponsor employee benefit plans to massive and unforeseen liabilities, review by this Court is warranted.

Petitioner Curtiss-Wright Corporation maintained a plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, in order to provide healthcare benefits to retired employees. (Pet. at 4.) The lower court held that Curtiss-Wright had properly reserved its right to amend or terminate these benefits. (Pet. at 13a.) The court also concluded that Curtiss-Wright had actually amended its plan to eliminate benefits for retirees of a closed facility. (Pet. at 5a-6a.)

The lower court also held, however, that this plan amendment was unenforceable because Curtiss-Wright's plan failed to satisfy the requirement of ERISA § 402 (b)(3) that a plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan". (Pet. at 7a, 11a.) Thus, despite the conclusion that Curtiss-Wright had exercised its reserved power to amend, the amendment was invalidated, and Curtiss-Wright was held liable to pay over $2 million in benefits as provided under the pre-amendment plan. (Pet. at 6, 10a-11a.)

The decision below conflicts with decisions from other Courts of Appeals in several respects and should be reversed. Even assuming *arguendo* that the plan's governing document failed to provide an amendment procedure as required by ERISA § 402(b)(3), the remedy fashioned by the lower court in this case—invalidation of the amendment—is not one mandated or supported by ERISA's remedial scheme. Other circuits faced with similar circumstances have instead, consistent with established trust law principles, enforced amendments where it was clear, as here, that the plan's sponsor had both the power and intent to make the amendment.

Resolution of this circuit conflict is particularly important in these circumstances because the decision below

will engender uncertainty and litigation over the current validity of almost 20 years of post-ERISA plan amendments and expose plan sponsors to massive liabilities for benefits that they reasonably believed had been eliminated or modified by plan amendments now called into question by the decision. The plan provision authorizing amendments that was found inadequate by the court below is virtually identical to model language issued by the Internal Revenue Service and contained in numerous form books used by employee benefits practitioners. The conclusion of the court below that this commonplace formulation does not allow enforceable plan amendments presents an administrative nightmare for plan fiduciaries who must determine whether plan terms that resulted from amendments are valid and creates an open season for litigation challenging such amendments.

While the rationale of the decision below applies equally to all types of ERISA-covered plans, the litigation it is certain to engender unless reversed would have its greatest impact on welfare plans, including those that provide retiree medical benefits of the type at issue in this case. The efforts of American corporations in recent years to restrain their employee healthcare expenditures and especially to rein in their liabilities for retiree medical benefits have already led to a substantial amount of litigation. While adopting differing approaches to interpretation of plan documents, the circuit courts have uniformly held that welfare benefits—unlike pension benefits which are required by ERISA to vest according to a fixed schedule —do not vest but may be terminated or modified by a plan sponsor that has reserved its right to do so.

The decision below provides a roadmap to litigate around this non-vesting principle by making it impossible to have amended a plan to reduce benefits where there was not technical compliance with the lower court's interpretation of ERISA § 402(b)(3). While employers may be able to adapt to this rule on a prospective basis, they cannot fix the past. Even if a plan's amendment procedure

is immediately brought into conformance with the lower court's interpretation of ERISA § 402(b)(3) and a plan is immediately restated to ratify all past amendments, benefit claims arising from events prior to such restatement would be determined under the pre-restated plan. Thus, the enforceability of many existing plan terms is placed in doubt by the decision and can only be resolved through the litigation which, given that billions of dollars of benefits are potentially at stake, will inevitably ensue. The predictable result of exposing corporations to massive and unforeseen liabilities is that corporations will seek to offset these liabilities by reducing benefit costs in other ways, thus ultimately harming the plan participants whom ERISA was intended to protect. To resolve the questions presented by the petition and avoid this wasteful flood of litigation, review by this Court should be granted.

ARGUMENT

A. The Decision Below Creates Conflicts in the Circuits in Several Respects That Warrant Resolution by This Court

Curtiss-Wright promulgated an umbrella plan document, labeled the Constitution, which incorporated such "plan or plans" as Curtiss-Wright "might from time-to-time adopt." The Constitution provided that "the Company" (*i.e.*, Curtiss-Wright) reserved the right to terminate the plan "for any reason at any time" and "at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan". (Pet. at 4a.) Likewise, the Summary Plan Description issued in 1983, shortly before the challenged amendment in this case, also expressly preserved Curtiss-Wright's ability to modify or terminate the plan "at any time." (Pet. at 5a-6a.)

The Court of Appeals, while ruling that Curtiss-Wright had thus preserved its right to amend the plan's benefits, held that the amendment was unenforceable because the plan did not comply with ERISA § 402(b)(3) and thus

could not be validly amended. (Pet. at 11a.) The rationale for this conclusion was that reservation of the right to amend on the part of "the Company" did not provide adequate identification of either an amendment procedure or of the "persons who have authority to amend the plan." (Pet. at 7a-8a.)[1]

Assuming *arguendo* that Curtiss-Wright failed to comply with § 402(b)(3), the holding of the court below conflicts with holdings of other circuits. As a general principle, courts have insisted that plan participants' benefit entitlements be determined solely under the written terms of the plan.[2] In that way, all parties affected by the plan, employers as well as participants, will be able to rely on the written plan as the definitive statement of benefits.[3] But the decision below turns this principle on

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[1] The court's conclusion that Curtiss-Wright's reservation of an amendment right to "the Company" was legally insufficient is dubious on its face. Since § 3(9) of ERISA expressly defines the term "person" to include a "corporation" and other entities besides an "individual", Curtiss-Wright's designation of itself as, to use § 402(b)(3)'s phrasing, the "person" with "authority to amend the plan" was in compliance with § 402(b)(3). In a variety of other contexts, courts have recognized what § 3(9)'s language makes plain, *i.e.*, that a "person" need not be an "individual." *See, e.g., Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3rd Cir. 1991) (corporation is a "person" for purposes of ERISA under § 3(9)); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *Scarbrough v. Perez*, 870 F.2d 1079, 1082 (6th Cir. 1989).

[2] *See, e.g., Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Central States v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

[3] The sole exception recognized by some courts is where a participant has reasonably relied to his or her detriment on some authoritative statement not contained in the written plan terms. *See, e.g., Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1158 (6th Cir. 1988) (affirmative misstatements made by corporate sponsor and relied upon by participants may entitle participants to those benefits).

its head. Although plaintiffs were not entitled to benefits under the terms of the written post-amendment plan and made no claim that they had ever been led to believe otherwise, the lower court nonetheless awarded them benefits.[4]

The decision of the court below to award a substantive remedy, *i.e.*, the pre-amendment benefits, for a violation of § 402(b)(3) also conflicts with decisions from several other circuits that a sponsor's or fiduciary's procedural violation of ERISA, absent a showing of bad faith, should not entitle a participant or beneficiary to an award of benefits not provided by a plan's terms.[5] Indeed, at least two other Courts of Appeals have resolved the remedy question presented by the petition directly contrary to the decision below. Thus, in *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), and *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 296 (4th Cir. 1993), the courts declined to award a substantive remedy for violations of § 402(b)(3) even where there was no reservation of amendment power

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[4] Indeed, the problems that the decision causes for plan administrators are aggravated by the court's attempt to limit its holding to amendments "advantageous to the sponsor's interest". (Pet. at 11a.) All plan amendments, even ones that increase benefits, are presumably "advantageous" to the sponsor, or the sponsor would not make the amendment. Moreover, it is typical for plan amendments both to simultaneously improve and restrict benefits and to affect different participants differently. For example, an amendment implementing a preferred provider network may provide greater benefits to participants who use network providers while lowering benefits to other participants.

[5] *See, e.g., Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991) ("[a]n employer's procedural violations of ERISA entitle employees to monetary relief only in exceptional cases"); *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1499 (11th Cir. 1987) ("ordinarily, violations of ERISA's procedural requirements do not entitle a claimant to substantive relief").

whatsoever. By holding that Curtiss-Wright could not enforce its amended plan, even though it had expressly reserved its amendment power in writing, the court below reached a result that is both ironic and obviously inconsistent with the results in *Adams* and *Biggers*.

The reason advanced by the court below for awarding a substantive remedy was that this was necessary to effectuate ERISA's goal of ensuring that participants know the details of the plan amendment process so that they may "determine with certainty at any given time exactly what the plan provides." (Pet. at 8a.) To the contrary, however, the way in which participants can determine what the plan provides is to look at the plan terms, or at the summary of those terms contained in the Summary Plan Description ("SPD"), which is the document required under § 102(b) of ERISA, 29 U.S.C. § 1022(b), to be distributed to participants. Notably, neither § 102 (b) nor the implementing agency regulations require that the SPD describe any of the details of the amendment process that were deemed so critical by the court below. *See* 29 C.F.R. § 2520.102-3. Thus, the policy rationale advanced by the court below for requiring a substantive remedy is actually inconsistent with, not in furtherance of, the express disclosure requirements of ERISA.

Moreover, as noted in *Biggers*, the result reached by the court below is contrary to principles of trust law. 4 F.3d at 291. This Court has frequently noted that ERISA's fiduciary duty provisions derive from trust law and has referred to trust law in interpreting those provisions (*see, e.g., NLRB v. Amax Coal Co., Div. of Amax, Inc.*, 453 U.S. 322, 332-34 (1981); *Central States v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)), even as to plans not maintained in trust form. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). Section 331(1) of the Restatement

(Second) of Trusts (1959) provides that a "settlor has power to modify the trust if and to the extent that by the terms of the trust he reserved such a power." Comment c to § 331 is even more explicit as to the situation presented in this case and states:

> *Where no method of modification specified.* If the settlor reserves a power to modify the trust but does not specify any method of modification, the power may be exercised by any method which sufficiently manifests his intention to modify the trust.

It is difficult to envision a clearer manifestation of a plan sponsor's intent to amend a plan than Curtiss-Wright's promulgation and distribution of amended plan terms. Accordingly, under the trust law principles embodied in the Restatement, Curtiss-Wright's amendment should have been enforced. Because the decision below disregards these principles which have been properly applied by other circuits and also conflicts with decisions from other circuits in other respects, review by this Court should be granted.

B. The Decision Below Threatens Employers With Enormous and Unforeseen Liabilities and Thus Raises an Issue Warranting Review by This Court

The significance of the circuit split is accentuated in this case because the decision below is likely to lead to a flood of litigation, especially involving, although by no means limited to, health benefit provisions of welfare plans. By exposing employers to the enormous costs and potential liabilities of such litigation, the decision will ultimately lead these employers to restrain their benefit costs in other ways, to the detriment of plan participants.

Employee benefit plans under ERISA are categorized as pension plans or welfare plans. ERISA § 3(1),(2), 29 U.S.C. § 1002(1), (2). With limited exceptions, pension plans pay their benefits from trusts established to

qualify for the favorable tax treatment afforded by sections 401(a) and 501(a) of the Internal Revenue Code, 26 U.S.C. §§ 401(a), 501(a), and major plan amendments are routinely submitted to the Internal Revenue Service for advance determinations that the plan, as drafted, will qualify for this treatment. *Employee Benefits Law*, A.B.A. Sec. of Labor & Employment Law 462 (Steven J. Sacher, *et al.*, eds. 1991). Given the need for formality in drafting pension plan and trust documents and the routine practice of requesting governmental review, pension plan documents are typically drafted and reviewed by counsel or other benefits professionals and are thus more likely to comply with all of ERISA's formal requirements.

Even as to carefully drafted pension plans, however, there is good reason to doubt whether many plans have complied with the interpretation of § 402(b)(3) adopted by the court below. Prototype plan documents approved by the Internal Revenue Service for use by institutional designers of tax-qualified pension plans, such as banks and insurance companies, contain amendment language essentially identical to that found inadequate by the court below. *7 Pension and Profit Sharing 2d* (R.I.A. 1992) at 140,569. Likewise, model plan documents offered by major commercial services also offer language no more specific than that used by Curtiss-Wright. *See, e.g., Pens. Plan Guide* (CCH) (1989) at ¶ 30,070 (sample amendment provision of model defined benefit pension plan).

Although pension plans that incorporated any of these model provisions may now be vulnerable to suit as to past amendments, the problem is even more widespread for welfare plans. Benefits under the vast majority of welfare plans are not funded through trusts but are typically paid directly from corporate assets or insurance policies. Thus, welfare plans as a rule are much more casually and less formally documented than pension plans and are less likely to be drafted by benefits professionals. Moreover,

the terms of some welfare plans, such as health plans, typically change annually as companies negotiate new arrangements in an attempt to stretch their benefit dollars. Given the relative informality of welfare plan documentation and the frequency with which amendments occur in such plans, these plans are especially susceptible to suit under the rationale of the decision below.[6]

In recent years, the normal practice of frequent amendments to corporate welfare benefit plans has accelerated due to the national surge in healthcare costs.[7] A 1992 study by the General Accounting Office ("GAO") showed that health expenditures "have been the most rapidly growing component of employee compensation" and "escalated at more than twice the general inflation rate during the late 1980's". *See* Human Resources Div., U.S. General Accounting Office, *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* 4 (1992) ("1992 GAO Report"). In order to control their healthcare spending, employers have, according to the GAO, focused on "benefit plan design" as "the first factor a firm will alter to control rising costs." *Id.* at 10. Among the numerous design changes most frequently implemented by plan sponsors to control costs are the shifting of costs to employees through increased deductibles, copayments, and employees' share of premiums; cost-sharing incentives, including managed care arrangements that give financial incentives to participants to use net-

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[6] Indeed, the facts of this case reflect a sequence and documentation typical of corporate health plans. Curtiss-Wright successively contracted with different insurance carriers. Each insurance carrier provided somewhat different coverage, which resulted in a new SPD being issued to describe each plan change. (Pet. at 3a.)

[7] Although healthcare benefit plans are the most widespread type of welfare plan, other types of welfare benefits—including severance, disability, and life insurance—are also commonly provided by ERISA-covered plans. Plans providing these types of benefits also tend to be informally documented and to be amended frequently and are thus also heavily impacted by the decision below.

works of preferred providers; and cutbacks or elimination of coverage, including coverage for retired employees. *Id.* at 10-11.

These healthcare plan design changes can only be accomplished by plan amendments now called into question by the decision below. The enormous magnitude of the financial exposure to plan sponsors from the decision below can be seen by focusing on the type of change at issue in this case, cutbacks in retiree health benefits, which is only one of the numerous plan design changes identified by the 1992 GAO Report.

In a 1993 study, the GAO estimated the liability of American corporations to pay health benefits to retired former employees and their dependents at a staggering $412 billion. Human Resources Div., U.S. General Accounting Office, *Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System* 2 (1993) ("1993 GAO Report"). Numerous private studies have estimated this liability to be much higher, even as high as $2 trillion. *See* Gregory Parker Rogers, *Rethinking Yard-Man: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 Emory L.J. 1033, 1036 n.10 (1988) (collecting studies). Plan sponsors' recognition of the magnitude of these liabilities has been accentuated by the issuance of Financial Accounting Standard No. 106: Employers' Accounting for Postretirement Benefits Other Than Pensions (1990) ("FAS 106"), which, effective December 15, 1992, required companies that are subject to financial reporting requirements to recognize these liabilities on their balance sheets on an accrual basis, rather than the then-prevalent pay-as-you-go (cash) basis method.

Not surprisingly, then, companies' attempts to limit, modify, or terminate these benefit plans have occurred with increasing frequency. Five studies reviewed by GAO reported that from 42 percent to 93 percent of the employers surveyed had changed their retiree health benefit

plans over the past few years to contain costs or to decrease FAS 106 liability, and three of these studies reported that 33, 35, and 100 percent of the employers were considering future changes. The most frequent changes made by employers are to raise retiree premium contributions, deductibles and copayments, tighten eligibility requirements, eliminate certain covered services, and shift to managed care programs. *See* 1993 GAO Report at 3 & App. II.

Equally unsurprisingly, these corporate attempts to control or eliminate retiree healthcare costs have frequently resulted in litigation. The circuit courts, although differing somewhat in their interpretive approaches, have consistently held that these benefits—because they are welfare, not pension, benefits—do not vest as a matter of law but may be amended if the sponsor has reserved the amendment power.[8] Indeed, many of the decisions that have upheld amendments to such benefits have involved amendment clauses with wording very close to that used by Curtiss-Wright. *See, e.g., Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 933 (5th Cir.) ("Company reserves the right to alter, amend, delete, cancel or otherwise change the plan or any of the provisions of the plan at anytime [sic]"), *cert. denied*, 114 S. Ct. 196 (1993); *Musto v. American Gen. Corp.*, 861 F.2d 897, 903 (6th Cir. 1988) ("[I]nsurance coverage . . . may be amended or discontinued at any time"), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 490, 492 n.1 (2d Cir. 1988) ("[t]he Company reserves the right at any time to change or discontinue this [plan]").

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[8] *See, e.g., McGann v. H & H Music Co.*, 946 F.2d 401, 405-07 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied*, 481 U.S. 1016 (1987).

By holding that Curtiss-Wright's amendment language is inadequate to support an amendment of retiree benefits, the decision below provides an obvious litigation route for plaintiffs around the non-vesting principle established by the circuit courts in these retiree health cases and in numerous other cases involving other types of welfare benefit plans. In the short run, the liabilities arising from the decision, unless it is reversed, will fall on the corporations which sponsor these plans and which now find themselves liable under plan provisions they thought had been amended. The ultimate cost, however, would be borne by other plan beneficiaries as corporations eliminate or otherwise curtail other benefits to compensate for these increased liabilities.[9] As this Court has previously recognized, the costs of unanticipated liabilities under ERISA frequently fall "upon ERISA plans themselves" thus defeating the statutory goal of promoting and expanding plan coverage. *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2072 (1993), *citing Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). To avoid this result and to protect plan sponsors from liabilities they could not have foreseen prior to the decision below, review should be granted.

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[9] This reduction of benefits by plan sponsors in response to increased plan cost is not theoretical but has been empirically observed. *See* 1992 GAO Report at 10. In an attempt to control overall health spending, plans have tended to first eliminate or limit family coverage, retiree coverage, or covered services and to limit coverage for specific conditions. *Id.* at 10-11.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and review the decision below.

Respectfully submitted,

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